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Supreme Court, U.S.
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No. 98-810

In The

Supreme Court of the United States

October Term, 1998

SHELDON P. KOTTLE, M.D.,

Petitioner,

vs.

NORTHWEST KIDNEY CENTERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Plaintiff's Claims Are Not Barred By the Statute of Limitations.

In its opposition to Kottle's Petition, Northwest Kidney Centers ("NWK") argues that the dismissal of Dr. Kottle's complaint should be upheld on the alternative basis that Kottle's claims were not filed within the applicable statute of limitations. (Opp. Cert. 7, 25-26). NWK has made this argument in the courts below, both of which disregarded it for good reason. This defense has little merit.

An antitrust action under federal or state law must be "commenced within four years after the cause of action accrued." 15 U.S.C. § 15b; *see also* RCW 19.86.120. An antitrust cause of action does not accrue until the defendant commits some act or acts which violate the antitrust laws *and* which injures plaintiff's business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). A plaintiff suing under antitrust laws has no right to maintain suit until he is in fact injured. *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77 (D.C. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). In the absence of injury, there is no cause of action.

The Washington Department of Health denied Dr. Kottle's two certificate of need applications on March 30, 1992 based in large measure upon false and deceptive "information" provided to it by NWK. While NWK obviously provided this false and deceptive "information" to the Department well before March 30, 1992, that is the earliest date on which it could be said that Kottle suffered

any kind of injury. Prior to that date, he did not and could not provide kidney dialysis services in the state of Washington; therefore, NWK's false and deceptive "information", however wrong and misguided, had no impact on his trade or business. As this Court articulated in *Zenith*, a "cause of action for future damages . . . will accrue only on the date they are suffered." *Zenith*, 401 U.S. at 339. The injury did not occur until Kottle was denied the opportunity to engage in the kidney dialysis business – on March 30, 1992. Kottle's complaint was filed on March 27, 1996, within the four year statute of limitations set forth in federal and state law.[1]

NWK's reliance upon the Ninth Circuit decision in *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987) and the District Court ruling in *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F.Supp. 429 (S.D.Ohio 1991) is seriously misplaced. In both cases, the "last overt act causing injury" was the initiation of legal proceedings which caused a *present* injury to the plaintiff's trade or business. In *Lender's Service*, the plaintiff was presently engaged in the business of providing property reports

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[1] The Complaint was filed only *four months* after the Department of Health awarded NWK a certificate of need to construct dialysis facilities of the exact same size, scope and location NWK had earlier argued to be unnecessary. Although NWK's CON was granted in December 1995, NWK's own internal documents reflect that it was being planned years before. CR 38 Exhibit 1, pp. 7, 88; CR 31 Exhibit 1 pp. 17-20. Nor is there anything in the record whatsoever to support NWK's argument that its dramatically altered calculation of "need" in 1994 was based upon "changing demographics, demand for service, and new technology" that had occurred since 1992. (Opp. Cert. 18).

when the Dayton Bar Association filed suit claiming that plaintiff was engaged in the unauthorized practice of law. *Lender's Service, Inc.*, 758 F.Supp. at 433. The suit by the bar association had an immediate effect on plaintiff's business; therefore, the district court correctly found that the date in which the bar association filed the suit was the date in which the statute of limitations began to run.

Similarly, in *Pace Indus.*, the alleged antitrust violation was the filing of a lawsuit which sought to enforce allegedly illegal covenant not to compete. Pace Industries was presently engaged in the business of manufacturing and marketing disc testing equipment when Three Phoenix Company filed a state court injunction and accounting action. *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d at 236. The action had an *immediate* effect on Pace Industries' business, and therefore was deemed by the Ninth Circuit to be the "last overt act" causing injury. "We hold that where the alleged antitrust violation is the attempted enforcement of an illegal contract through judicial processes, the initiation of judicial proceedings is the last overt act for purposes of the statute of limitations." *Id.* at 236.

Both cases stand in stark contrast to Dr. Kottle's situation. Dr. Kottle was not in the business of providing kidney dialysis services during NWK's misinformation campaign; he needed to obtain a certificate of need from the Washington Department of Health before he could engage in such services. It was not until he was denied this opportunity that he suffered any damages from the false and deceptive information NWK provided to the Washington Department of Health.

CONCLUSION

Kottle's complaint was brought within the four year statute of limitations applicable to federal and state antitrust claims. The pleadings filed by Kottle meet the threshold of sufficiency and specificity to sustain his allegations that NWK made intentional misrepresentations and false statements to the Washington Department of Health for which it should not be shielded from liability. This is a case in which the "sham" exception to Noerr Pennington immunity should be applied. The petition for a writ of certiorari should be granted.

Respectfully submitted this 1st day of February, 1998.

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